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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FRASIEL L. HUGHEY,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* INSURANCE CRIME PREVENTION INSTITUTE AND NATIONAL HEALTH CARE ANTI-FRAUD ASSOCIATION IN SUPPORT OF RESPONDENT

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MOTION OF INSURANCE CRIME PREVENTION INSTITUTE AND NATIONAL HEALTH CARE ANTI-FRAUD ASSOCIATION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, Insurance Crime Prevention Institute ("ICPI") and National Health Care Anti-Fraud Association ("NHCAA") hereby seek leave to participate as *amici curiae* in the above-captioned litigation. ICPI and NHCAA seek leave to participate as *amici curiae* in support of the position advocated by the United States.[1]

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[1] This request to participate in this litigation has the support of the United States. ICPI and NHCAA have contacted counsel for the petitioner, but have not received his consent to participate in this litigation.

This brief seeks to offer the perspective of the victims of crime, who are not normally represented in federal criminal cases but who are the intended beneficiaries of the VWPA. The members of *amici curiae* are insurers and other public and private entities that are frequent victims of broad-ranging economic crimes often prosecuted under federal statutes.[2] Thus, insurers and other reimbursement organizations have an important interest in the efficacy of restitution.[3] These companies also have an interest in the interpretation of the VWPA as direct victims of fraudulent claims.

This brief brings to the Court's attention relevant legal principles and facts distinct from the prosecution perspective of the United States that bear on the Court's resolution of this case. *Amici curiae* therefore address relevant matter that has not already been brought to the attention of the Court by the parties.

As petitioner recognizes, the VWPA's fundamental purpose is to redress injuries to victims caused by defendants' criminal conduct. ICPI and NHCAA demonstrate why petitioner's interpretation of the VWPA defeats this primary goal and why this reading of the VWPA is neither required by the statutory terms nor supportable by the entirety of the statute. ICPI and NHCAA propose a less truncated approach that will accommodate both the statutory language and Congress' undisputed purpose to provide effective restitution without infringing defendants' rights. This approach implements the VWPA requirement of restitution for "any victim of such offense" to encompass all victims of the defendant's integrated criminal scheme. This interpretation will effectively compensate victims, will encourage essential victim participation in the criminal process and will not arbitrarily award and deny restitution to individual victims without a rational basis. Moreover, this interpretation comports with this Court's fundamental sentencing principles that allow sentencing courts to look beyond the crime of conviction in determining appropriate sentences.

Wherefore, ICPI and NHCAA hereby seek leave to participate in this litigation as *amici curiae*.

Respectfully submitted,

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March 6, 1990

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[2] Insurance fraud is a major economic problem across America, costing the public an estimated $15 billion each year. *See* Borda, *Insurance Fraud Costs Billions*, Journal of Commerce (Dec. 3, 1987). The U.S. Chamber of Commerce estimates that ten percent of the claims submitted to U.S. insurance carriers contain some fraud. *Id.*

[3] Insurance companies and others that have indemnified victims for their losses are proper recipients of restitution under VWPA. *See United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988) (insurance company); *United States v. Bortnovsky*, 879 F.2d 30 (2d Cir. 1989) (New York Property Insurance Underwriters Association); *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

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BRIEF OF *AMICI CURIAE* INSURANCE CRIME PREVENTION INSTITUTE AND NATIONAL HEALTH CARE ANTI-FRAUD ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

This case addresses the breadth of restitution available under the Victim and Witness Protection Act ("VWPA")[1] to victims of federal crimes. This brief is filed on behalf of the Insurance Crime Prevention Institute ("ICPI") and the National Health Care Anti-Fraud Association ("NHCAA"), whose members include insurers and other entities that are frequent victims, both directly and indirectly, of wide-scale frauds and other federal crimes. As members of the class of persons whom the VWPA was explicitly enacted to benefit, *amici curiae* file this brief to present the Court with a

[1] Act of Oct. 12, 1982, Pub. L. No. 97-291, 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1248 (codified as amended in various sections of 18 U.S.C.).

broader perspective on the VWPA than may be presented by the parties concerning the narrow circumstances of the instant case. More factually typical of cases in which *amici curiae* are victims are those in which fraudulent schemes, racketeering enterprises or conspiracies are specifically charged in the indictment.

ICPI is a national not-for-profit association, formed in 1970 to investigate reported criminal insurance fraud in cooperation with federal and state law enforcement agencies. ICPI is funded by approximately 380 insurance companies that write about 80 percent of the casualty/property insurance premiums in the United States.

The National Health Care Anti-Fraud Association, founded in 1985, is a mixed public/private association consisting of private insurance carriers, health care reimbursement organizations, Blue Cross and Blue Shield organizations and state and federal law enforcement and regulatory agencies. NHCAA's purpose is to improve the prevention, detection and civil and criminal prosecution of health care fraud. In particular, NHCAA seeks to educate the public as to the importance of the fight against health care fraud, expand the investigative capabilities of health care reimbursement organizations through education in the prevention, detection, investigation and prosecution of health care fraud and assist law enforcement agencies in the prosecution of health care fraud.

Insurance fraud is both difficult to detect and socially and economically significant. This type of fraud costs the public an estimated $15 billion each year. *See* Borda, *Insurance Fraud Costs Billions*, Journal of Commerce (Dec. 3, 1987). The United States Chamber of Commerce estimates that ten percent of the claims submitted to U.S. insurance carriers contain some fraud. *Id.*

Insurers and other reimbursement organizations have an important interest in the efficacy of restitution, not

only because they are direct victims of crime, but also because they frequently must pay for the losses and injuries sustained by other victims as well.[2] One of the purposes of the VWPA "is to remedy undesirable situations in which 'insurance companies and the insurance buying public are being asked to pay off the offender's debt.'" *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985), quoting S. Rep. No. 532, 97th Cong., 2d Sess. 31, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2519. Indeed, the Act specifically provides that "the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss." 18 U.S.C. § 3579(e)(1).[3]

SUMMARY OF ARGUMENT

As petitioner recognizes, the VWPA's fundamental purpose is to "'ensure that the Federal Government does all that is possible'" within the limits of the Constitution and available resources "'to assist victims and witnesses of crime.'" Brief for Petitioner at 17, quoting from VWPA, Act of Oct. 12, 1982, Pub. L. No. 97-291, § 2(b)(2), 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1248, 1249 (uncodified), *reprinted in* 18 U.S.C.A. § 1512 note (West 1989). Petitioner's restricted interpretation of the VWPA, however, defeats this primary

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[2] Insurance companies and others that have indemnified victims for their losses are proper recipients of restitution under VWPA. *See United States v. Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988) (insurance company); *United States v. Bortnovsky*, 879 F.2d 30 (2d Cir. 1989) (New York Property Insurance Underwriters Association); *United States v. Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

[3] In the petitioner's case, restitution was ordered pursuant to 18 U.S.C. §§ 3579 and 3580 (1982 and Supp. IV 1986), which are now codified at 18 U.S.C. §§ 3663 and 3664 (1987). Throughout this litigation, the earlier codification of VWPA has been used. For the sake of clarity, *amici curiae* will therefore refer to sections 3579 and 3580.

goal. Such a narrow reading of the VWPA is not required by the statutory language permitting restitution to "any victim" of the "offense," is not compatible with the statute as a whole, and is contrary to Congress' express intent in enacting the VWPA. By contrast, a less truncated approach that awards restitution to all victims of a defendant's criminal scheme accommodates both the statutory language and Congress' undisputed purpose to provide the fullest restitution possible without infringing defendants' rights.

Amici curiae make the following principal points in support of a meaningful system of restitution:

(1) When the criminal defendant commits a series of criminal acts that constitute an integrated criminal scheme, the VWPA requirement of restitution for "any victim of such offense" must be read to encompass all victims of the criminal scheme; moreover, when such schemes, conspiracies or enterprises are specifically alleged, the VWPA's provision for restitution to all victims is unequivocal;

(2) An unduly narrow interpretation of the VWPA will arbitrarily award and deny restitution to individual victims without a rational basis;

(3) This Court consistently has allowed sentencing courts to look beyond the specific count of conviction in determining appropriate sentences;

(4) The statutory interpretation petitioner urges will not effectively compensate victims and will discourage essential victim participation in the criminal justice system;

(5) Allowing restitution beyond the minimal elements necessary to prove the count of conviction merely allows victims to recover for their losses without the necessity of conducting separate civil litigation; and

(6) Notice and an opportunity to contest factual issues as to the scope of restitution obviate any fairness or due process concerns.

ARGUMENT

I. THE VWPA REQUIRES AN INTERPRETATION THAT WILL PROVIDE MEANINGFUL COMPENSATION TO VICTIMS OF CRIME.

The central issue in this case is the meaning of the phrase "any victim of such offense," as it is used in 18 U.S.C. § 3579(a). Petitioner advocates an unduly narrow reading of this phrase that will thwart the purposes of the VWPA and deny restitution to deserving victims. His interpretation is not required by the VWPA. In fact, a review of the VWPA as a whole necessitates a broader reading that allows a court to look realistically at the scope of the indictment, the evidence and the plea bargain in determining an appropriate restitution award.[4]

The VWPA provides that "[t]he court, when sentencing a defendant convicted of an offense under [Title 18 and other provisions], may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense." 18 U.S.C. § 3579(a)(1). In determining whether

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[4] Interpretation of statutory language should be a "holistic endeavor." *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). In *United Savings Ass'n*, this Court explained the necessity for interpreting the statute as a whole:

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, . . . or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

Id. (citations omitted).

to order restitution and the amount of such restitution, "[t]he court . . . shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a).

The VWPA expressly states that Congress' purposes in enacting the statute were "(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; [and] (2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant." VWPA, Act of Oct. 12, 1982, Pub. L. No. 97-291, § 2(b)(2), 1982 U.S. Code Cong. & Admin. News (96 Stat.) 1248, 1249 (uncodified), *reprinted in* 18 U.S.C.A. § 1512 note (West 1989). The VWPA also provides that restitution awards are to be "as fair as possible to the victim." 18 U.S.C. § 3579(d); *see also United States v. Mounts*, 793 F.2d 125, 127 (6th Cir.), *cert. denied*, 479 U.S. 1019 (1986).[5]

This statutory language, viewed in the context of the sentencing system in which the VWPA operates, makes clear that the VWPA seeks to compensate all victims who suffer losses as a result of a defendant's overall criminal offense. The "victims" of this offense are all persons who suffer economic loss as a result of the integrated criminal scheme, conspiracy or enterprise which forms the basis for a finding of guilt, whether based on a trial or plea agreement. The victims of the offense for which

[5] To demonstrate the importance of the restitution system, the Sentencing Guidelines make clear that "[i]f a defendant is ordered to make restitution and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution." United States Sentencing Commission, Federal Sentencing Guidelines § 5E4.1.(b) (West 1988).

a defendant is convicted can be determined from the indictment, the plea agreement and the evidence establishing defendant's guilt.

The present case is not the typical federal prosecution in which an integrated scheme is formally charged which alleges criminal conduct that has caused substantial economic harm and affected numerous victims. Those cases often involve federal charges of conspiracy, 18 U.S.C. § 371, racketeering enterprises, 18 U.S.C. §§ 1961 *et seq.*, or a scheme to defraud, *e.g.*, 18 U.S.C. §§ 1341, 1343 (mail and wire fraud).[6] Frequently, the defendants are not individuals alone but include corporations and other business entities. On their face, counts formally charging an integrated scheme allege acts which by their nature may have multiple victims. Even under petitioner's narrow reading of the VWPA, all such victims are therefore victims "of such offense" and should receive restitution. This result follows from the undisputed plain language of the VWPA, and is particularly warranted in light of Congress' explicit intention that the act redress to the fullest extent possible all victims of a wrongdoer's conduct.

However, even where the broad nature of the offense is not wholly described within the narrow elements of a particular count, the VWPA should still be read to provide restitution for all victims of the offense which is

[6] "[W]hen the crime charged involves a scheme to defraud, a sentencing court may order restitution paid to victims of the entire scheme even though all of them are not named in the indictment or information." *United States v. Pomazi*, 851 F.2d 244, 250 (9th Cir. 1988). *Accord, Phillips v. United States*, 679 F.2d 192, 196 (9th Cir. 1982) ("restitution may be ordered in an amount caused by the entire scheme rather than only in the amount caused by a particular mailing"); *see also United States v. Davies*, 683 F.2d 1052, 1055 (7th Cir. 1982) ("it is within the power of the court to require restitution of any amount up to the entire illicit gain from such a scheme, even if only some specific incidents are the basis of the guilty plea").

encompassed within the conduct for which defendant is found guilty. The test for determining what conduct constitutes the "offense" need not be—and should not be—vague. Instead, determination of who are victims of the offense should be determined from a plain, but integrated, reading of the indictment and plea agreement, if any, as well as the evidence presented necessary to prove defendant's guilt. Where a fair reading of the charges and evidence establishes a single integrated offense, allowing restitution to "any victim of such offense" does no violence to the statutory language.[7]

The congressional intent surely was that "*any* victim of such offense" be construed as encompassing those who suffered losses from the integrated criminal scheme which forms the basis of the indictment. No other interpretation achieves Congress' remedial goal reflected in the requirement that the court "consider the amount of the loss sustained by *any* victim as a result of the offense." 18 U.S.C. § 3580(a) (emphasis added). Any other reading would have Congress restricting the scope

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[7] In the present case, petitioner himself interpreted the indictment as alleging a single scheme. As part of the plea bargain, as described in a letter to the trial court by petitioner's attorney, the government agreed to dismiss all remaining counts of the indictment and not to prosecute petitioner for "any other offense arising in the Western District of Texas as *part of the scheme alleged in the indictment*," in exchange for the guilty plea. *United States v. Hughey*, 877 F.2d 1256, 1258 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 716 (1990) (emphasis added).

Moreover, as part of the government's factual proffer during the plea proceeding, the government stated that petitioner had repeated his criminal conduct with regard to a number of other cards. (J.A. 10). Evidence of such repeated thefts and credit card use in the instant case was relevant to the issues of identity and intent.

of "any victim" to the capriciously lucky winner of the plea bargaining lottery.[8]

This less restricted view of the statutory language is more consistent with the entirety of the VWPA, which allows the sentencing court to consider "such other factors as the court deems appropriate" in awarding restitution. 18 U.S.C. § 3580(a). As discussed below, this statute was enacted within the fundamental framework that a sentencing court should "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," in determining the appropriate sentence. *United States v. Tucker*, 404 U.S. 443, 446 (1972). The VWPA envisions that the sentencing court will conduct such a broad inquiry in determining the appropriate amount of restitution, and this inquiry surely includes the full scope of the criminal scheme. Because the sentencing court is to determine the appropriate amount of restitution based on the preponderance of the evidence, this broad-ranging inquiry merely allows the victim the opportunity to receive, as part of a criminal restitution payment, an amount equal to that which could be recovered in a civil proceeding against the criminal.

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[8] Cases decided under the Sentencing Guidelines indicate the appropriateness of a definition of "offense" which includes the acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. *See, e.g., United States v. Vopravil*, 891 F.2d 155, 158 (7th Cir. 1989) (court considered planned transaction that was part of the same course of conduct or common scheme as "clearly related conduct" for sentencing purposes); *United States v. Smith*, 887 F.2d 104, 108-09 (6th Cir. 1989) (sentencing court was not limited to that conduct established by jury finding, guilty plea or plea of *nolo contendere*; court should consider all conduct that was part of the same course of conduct or common scheme or plan as offense of conviction); *United States v. Mocciola*, 891 F.2d 13, 16 (1st Cir. 1989) (sentencing included acts of common scheme or plan as the offense of conviction).

To be sure, notice and other procedural safeguards are proper to assure fairness.[9] But once surprise is avoided and an opportunity to rebut is afforded, it would be a formalism inconsistent with both the statute's words and its manifest intent to hold that the happenstance of selecting examples for inclusion in an indictment or counts of an indictment for a guilty plea creates boundaries around the court's power to order restitution for "any victim".

II. LIMITING RESTITUTION TO THE COUNTS OF A PLEA BARGAIN WILL ARBITRARILY AWARD RESTITUTION BASED ON MERE CHANCE RATHER THAN ANY REASONABLE FORMULA.

Were restitution restricted to the counts chosen for a plea bargain—or artificially limited in an indictment—the public purpose Congress sought to address in the VWPA would be defeated. Congress could not have intended that one victim would be compensated and another would not because the first was mentioned in the first three counts to which defendant pled and the other was referenced in the last three counts which were dismissed; or because 25 were listed in the 25-count indictment and the other 80 were not. In enacting the VWPA to ensure to the fullest extent possible restitution to all victims, Congress expressed no intention that the restitution be awarded arbitrarily or stingily.[10]

In this case, petitioner had a single victim, a bank. By contrast, in many criminal schemes prosecuted under

[9] Rule 11 of the Federal Rules of Criminal Procedure "merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea." Advisory Committee Note for the 1985 Amendment to Fed. R. Crim. P. 11(c)(1).

[10] This Court has recently shown great reluctance to interpret a statute arbitrarily to favor one class of persons over another, particularly when such an interpretation would not achieve the principal purpose of the legislation at issue. *See United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988).

federal law, numerous victims have been affected. Petitioner's restitution system selects victims to compensate not on the basis of need, extent of injury, level of assistance to the prosecutor or any other rational factor, but solely on the happenstance of the plea bargaining process.[11]

The extent of plea bargaining in the criminal process is widely recognized. *See, e.g., Innes v. Dalsheim*, 864 F.2d 974, 976 (2d Cir. 1988), *cert. denied*, 110 S. Ct. 50 (1989) (noting a 1976 "estimate[] that as high as 90 percent of all criminal convictions are obtained by guilty pleas"); Fed. R. Crim. P. 11, Advisory Committee Note for the 1974 Amendment (noting a 1968 "estimate indicat[ing] that guilty pleas account for the disposition of as many as 95% of all criminal cases"); *see also Santobello v. New York*, 404 U.S. 257, 260 (1971) (the multitude of cases makes plea bargaining "an essential component of the administration of justice").

The plea bargaining and indictment systems also reflect goals that differ from the purposes of the VWPA:

> a prosecutor's decision to charge a defendant for one or more counts of an offense is discretionary, and that discretion is exercised taking into consideration law enforcement objectives which have nothing to do with the congressional objective of compensating crime victims. The decision to specify an amount in the indictment is also often solely for the purpose of satisfying jurisdictional requirements.

[11] The fundamental concept behind restitution, that of "[r]equiring a criminal offender to restore the victim to his original position is intuitively fair." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 934 (1984). This Note observes: "Doesn't it seem to be a rejection of common sense that a convicted offender is rarely made to pay for the damage he has done? Isn't it surprising that the victim generally gets nothing for his loss? Restitution—making the offender pay or work to restore the damage . . . —would seem to be a natural thing for sentencing policy and practice." *Id.* at 934 n.27 (citation omitted).

United States v. Hill, 798 F.2d 402, 405 (10th Cir. 1986). The prosecutor's decisions on indictment and plea bargain, based on a calculus of factors other than compensating victims, should not limit the ability of similarly situated victims to receive restitution.[12] The prosecutor, in exercising discretion to indict or plea bargain, does not envision this decision as a choice of one victim over another.

The possibilities for such arbitrary results cannot have escaped Congress. As the lower court noted, "if restitution were limited to the count of conviction, given the high levels of plea bargaining within our criminal system, in the majority of cases a victim could not be made whole. Congress was not unaware of the pervasive phenomenon of plea bargaining when it passed the VWPA." *United States v. Hughey*, 877 F.2d 1256, 1261 (5th Cir. 1989), *cert. granted*, 110 S. Ct. 716 (1990).[13]

III. THIS COURT CONSISTENTLY RECOGNIZES THAT A SENTENCING COURT MAY USE THE FULLEST INFORMATION POSSIBLE TO DETERMINE APPROPRIATE SENTENCES.

Allowing broad restitution is consistent with the normal practice of sentencing courts, which consider information beyond the counts of conviction in setting sen-

[12] Unlike the typical negotiated civil settlement, where both parties take into account the risks and costs of litigation, there is no procedure in the criminal system for the victims of crime to participate formally in this negotiating process. Similarly, the victim plays no role in the give-and-take of the negotiating process, and the victim receives no quid pro quo from these negotiations. Petitioner's argument would ensure that the victim has no meaningful participation in the plea bargain at all.

[13] *See, e.g., United States v. Spambanato*, 687 F. Supp. 46, 47, 48 (D. Conn. 1988), *aff'd*, 876 F.2d 5 (2d Cir. 1989) (court characterized guilty plea to single count of indictment as "a random choice of one of numerous check charges involved in a unitary scheme" and awarded restitution for the amount "lost by the victim as a result of defendant's overall course of conduct").

tences. To ensure appropriate punishment for criminal offenders, sentencing judges historically have had wide discretion to formulate sentences to fit the specifics of the crime and the criminal. In particular, the sentencing phase of criminal prosecutions traditionally has looked at criminal offenses other than those contained in criminal indictments and guilty pleas.

> [B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.

Williams v. New York, 337 U.S. 241, 246 (1949).

Restitution should be no different. Allowing restitution for losses due to a single integrated criminal scheme rather than those particular few instances acknowledged in a plea bargain accords with the sentencing procedures repeatedly endorsed by this Court.

The need to allow the sentencing judge to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," *United States v. Tucker*, 404 U.S. 443, 446 (1972), permeates the federal sentencing structure.[14] Specifically, 18 U.S.C. § 3661 provides that "[n]o

[14] These differences in standards reflect the differing purposes between the trial and sentencing procedures.

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he has been specifically accused. Rules of evidence have been fashioned for criminal trials which narrowly confine the trial contest to evidence that is strictly relevant to the particular offense charged. . . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appro-

limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." [15]

Indeed, the purpose of the sentencing procedure is "to provide the judge with as much information as reasonably practical concerning the defendant's 'character and propensities[,] . . . his present purposes and tendencies,' . . . and, indeed, 'every aspect of [his] life.'" *United States v. Grayson*, 438 U.S. 41, 48 (1978) (citations omitted).[16] The sentencing judge may also look at "criminal

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priate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

Williams v. New York, 337 U.S. 241, 246-47 (1949).

[15] This statutory provision is specifically incorporated into § 1B1.4 of the Sentencing Guidelines, which provides that "[i]n determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." United States Sentencing Commission, Federal Sentencing Guidelines, § 1B1.4 (West 1988). The Commentary to § 1B1.4 emphasizes that "if the defendant committed two robberies, but as part of a plea negotiation entered a guilty plea to only one, the robbery that was not taken into account by the guidelines would provide a reason for sentencing at the top of the guideline range." The Commentary also stresses that the phrase "unless otherwise prohibited by law" applies only to factors such as race, sex and national origin. *See* Sentencing Guidelines § 5H1.10.

[16] Reliable hearsay evidence accordingly is admissible in sentencing proceedings, as the rules against hearsay evidence do not apply to sentencing proceedings. *United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989); *United States v. Beaulieu*, 893 F.2d 1177 (10th Cir. 1990); *Lightbourne v. Dugger*, 829 F.2d 1012 (11th Cir. 1987), *cert. denied*, 109 S. Ct. 329 (1988); *United States v. Lovett*, 844 F.2d 487, 493 (7th Cir. 1988); *United States v. Lee*, 818 F.2d 1052 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987). "Hearsay evidence may be considered . . . so long as the defendant is given an opportunity to refute the evidence and the evidence bears

activity for which the defendant has not been prosecuted." *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983).[17] The broad reach of the sentencing process demonstrates that "[a]ny circumstance that aids the sentencing court in deriving a more complete and true picture regarding the convicted person's background, history, or behavior is properly considered." *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987).[18]

This practical, fair but broad inquiry cannot be reconciled with the oddly constricted approach that petitioner would have sentencing courts follow in determining monetary restitution. There is even more reason to allow a broad range of information to be received as it relates to

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'minimal indicia of reliability.'" *United States v. Hairston*, 888 F.2d 1349, 1353 (11th Cir. 1989) (citation omitted).

[17] *See also United States v. Jordan*, 890 F.2d 968 (7th Cir. 1989) (fact that government decided not to pursue prosecution on count returned by grand jury as part of plea agreement does not preclude consideration of that count in sentencing); *United States v. Donelson*, 695 F.2d 583, 590 (D.C. Cir. 1982) (court considered facts introduced at trial relating to other charges, even ones of which defendant was acquitted); *United States v. Benton*, 637 F.2d 1052, 1060 (5th Cir. 1981) (evidence of other crimes not resulting in conviction); *United States v. Ray*, 683 F.2d 1116 (7th Cir.), *cert. denied*, 459 U.S. 1091 (1982); *United States v. Lewis*, 862 F.2d 748, 750 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1169 (1989) (evidence of count which has been dismissed by government); *United States v. Cusenza*, 749 F.2d 473, 478 (7th Cir. 1984) (evidence of other criminal activity by defendant); *United States v. Shepherd*, 739 F.2d 510 (10th Cir. 1984); *United States v. York*, 830 F.2d 885 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988).

[18] The Sentencing Guidelines make clear that this information can be considered. The Commentary to Sentencing Guideline § 6A1.3 provides that "[i]n determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. Any information may be considered, so long as it has 'sufficient indicia of reliability to support its probable accuracy'." (citations omitted). *See also United States v. Cuellar-Flores*, 891 F.2d 92, 93 (5th Cir. 1989).

restitution, where only the defendant's property interest is at stake, than in the sentencing phase, "when his liberty or even his life is in issue." *United States v. Hairston*, 888 F.2d 1349, 1353 (11th Cir. 1989).

Petitioner's limitations contradict the basic ground rules for sentencing. "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937). Petitioner advocates that strictures not otherwise applicable to the court's sentencing judgments should limit how much of his illegal profits the convicted criminal must return. Surely it is neither necessary nor just that the criminal's interests be given greater weight when they are balanced against those of a concrete, specific claimant, his victim, than when they are weighed against the more abstract interests of society in his punishment.

IV. ALLOWING RESTITUTION BEYOND THE DENOMINATED COUNTS OF A PLEA BARGAIN WILL SERVE THE CONGRESSIONAL PURPOSE OF COMPENSATING VICTIMS OF CRIME AND ENCOURAGES VICTIMS TO ASSIST IN THE PROSECUTION AND INVESTIGATION OF CRIME.

Compensating victims is the primary purpose of the restitutionary provisions of VWPA.[19] In enacting this legislation, Congress recognized that

> too often the victim has been the "forgotten person" in the criminal justice system. With few exceptions, victims and witnesses are either ignored by the criminal justice system or simply used to identify offenders.
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> While the defendant in a Federal criminal proceeding is provided with counsel to explain to him both the criminal justice process and his rights as a defendant, the victim has no assistance and few rights. . . .
>
> This insensitivity and lack of concern for the victim and witness is a tragic failing in our criminal justice system, one which hurts the whole society. Without the cooperation of victims and witnesses, the criminal justice system would simply cease to function and few criminals, if any, would be brought to justice.

S. Rep. No. 532, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Admin. News 2515, 2516 ("Senate Report"). According to Congress, "[t]he premise [of the restitution scheme] is that the court in devising just sanctions for adjudicated offenders, should insure that the wrongdoer make good[], to the degree possible, the harm he has caused his victim." Senate Report at 2536.

The comments of various representatives and senators upon introduction of the VWPA indicate that protection and support of victims are the purposes of the Act:

> [i]n Congressional debate, the Act was heralded by its principal co-sponsors as legislation which "will do much to restore the faith of the American public in our system of justice," (statement of Sen. Laxalt), and as a measure "to begin the process of rebalancing the scales of justice . . . [to] insure that victims are given at least the rights now afforded routinely to the accused." (statement of Sen. Heinz). Representative McCollum described restitution as "the ultimate justice," [and] the Act would make restitution "the expected norm, and no longer an afterthought." (statement of Sen. Heinz).

Note, *Restitution in the Criminal Process: Procedures for Fixing the Offender's Liability*, 93 Yale L.J. 505, 505 n.2 (1984) (citations omitted).

[19] The VWPA was introduced in Congress during "Crime Victims Week" in April, 1982. *See* Proclamation No. 4929, 47 Fed. Reg. 16, 313 (1982); Note, *The Right to a Jury Trial to Determine Restitution Under the Victim and Witness Protection Act of 1982*, 63 Tex. L. Rev. 671 (1984).

Any restitution arrangement in which only a few victims of a criminal scheme receive restitution cannot be reconciled with the goals of the VWPA. If restitution is ordered only as to the specific count of a guilty plea, instead of compensating all victims of the offense, most victims will not receive the equity Congress intended.

Compensation for victims seeks more than equity, however. Incentives for victims to come forward aid law enforcement. The law enforcement system often depends on the voluntary participation of crime victims in order to investigate and prosecute criminals successfully. *See* R. Elias, The Politics of Victimization 134 (1986) (estimating that approximately 95% of all reported crimes involving specific victims are discovered from citizen complaints, usually from the victims themselves). The willingness of victims to come forward is vital to the successful prosecution of criminals.[20] Without this assistance in reporting crime, more crime effectively will go unpunished, as the criminal justice system is "absolutely

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[20] The encouragement of victim participation in the criminal process is also reflected in the public policy across the country which places significant burdens on tort actions against those who assist in the prosecution of crime. These actions have "never been regarded with any favor by the courts, and [are] hedged with restrictions which make [them] very difficult to maintain." W. Keeton, Prosser and Keeton on Torts § 119 at 876 (5th ed. 1984).

> This disfavor of [these] actions represents a value choice based on public policy considerations. Sound public policy and the aims of justice require the uncovering of crime and the prosecution of criminals. "A policy that discourages citizens from reporting crime or aiding in prosecution would be undesirable and detrimental to society in general."

Williams v. Ryder/P.I.E. Nationwide, Inc., 786 F.2d 854, 857 (8th Cir. 1986) (citation omitted). Generally, these actions are disfavored because "[t]hey have an undesirable tendency to unduly discourage citizens from seeking redress in the courts," *Chittenden Trust Co. v. Marshall*, 146 Vt. 543, 507 A.2d 965, 969-70 (1986), and because they tend to discourage prosecution of crime. *Kimbley v. City of Green River*, 663 P.2d 871, 882 (Wyo. 1983).

dependent" on victim cooperation. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 Calif. L. Rev. 417, 425 n.42 (1989) (quoting President's Task Force on Victims of Crime, Final Report V (Dec. 1982)).

This Court also has recognized the importance of victim participation in the criminal process.

> [T]he court wholly failed to take into account the interest of the victim. . . . [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts.

Morris v. Slappy, 461 U.S. 1, 14-15 (1983).

Today, the victim of crime no longer has a formal role to play in the prosecution of crime.[21] Participation in the

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[21] The crime victim once had a prominent part in directing the progress of the criminal justice system. "The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family." Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359 (1986). During the American colonial period, victims of crime were personally responsible for apprehending and punishing criminals. In particular, the victims made arrests themselves, paid sheriffs to apprehend criminals, and paid private attorneys to prosecute cases. *See* Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 Calif. L. Rev. 417, 419-20 (1989); Cardenas at 366-371. "When government took over the prosecution of criminal offenses, the victim of the crime became a forgotten entity in the criminal justice system." Note, *The Victim and Witness Protection Act of 1982: Who are the Victims of Which Offenses?*, 20 Val. U.L. Rev. 109, 109 (1985).

contemporary criminal process imposes numerous burdens on victims; many feel victimized not only by the crime, but by the process as well, so that they increasingly fail to assist law enforcement agencies, to the detriment of the public at large. As one scholar has stressed:

> [t]he criminal justice system's current response to the interests of beleagured crime victims is no better than timely, and possibly very late. A sense of alienation with the criminal justice system has reached such heights that many pieces of literature now discuss the problem in terms descriptive of a crisis. Surveys of crime victims reveal intense displeasure with the criminal justice system. Victims often do not report to the police the crimes that have been committed against them, prompting [one commentator] to blame the "decline of faith" in the criminal justice system for this corrosive effect: "Victims report few crimes to the authorities because they do not expect them to be responsive."

Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. L.J. & Pub. Pol'y 357, 357-58 (1986) (citations and footnotes omitted).[22]

The VWPA represents one effort to address the rights and interests of victims in the criminal justice system. The VWPA does not at all return to the days when the victim controlled the prosecution.[23] Instead, the VWPA

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[22] "The victims of crime are truly the forgotten people in the American criminal justice system and are all too often victimized twice—first by the crime and then by the system." Gittler, *Expanding The Role of The Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L. Rev. 117, 117 (1984). "The failure to grant crime victims a prominent role in the dispensation of criminal justice is particularly shortsighted because the continued functioning of the criminal justice system depends on victim cooperation both in reporting offenses and in assisting the prosecution of crimes." Kennard, 77 Calif. L. Rev. at 417.

[23] "The victim has no control over the amount of restitution awarded or over the decision to award restitution. Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant." *Kelly v. Robinson*, 479 U.S. 36, 52 (1986). In addition, the victim of crime usually has no grounds to challenge a prosecutor's decision not to initiate a prosecution. *S. v. D.*, 410 U.S. 614, 619 (1973).

makes financial fairness to the victim a component of the criminal's sentencing. This arrangement provides a modest and just benefit to the victim for participating in the criminal process, yielding increased social utility. "The fact that restitution benefits individual victims and forces the offender to be responsible to his victim does not make its inclusion in the criminal system inappropriate; rather, restitution underscores the criminal law's concern for victims of crime." Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 936 (1984).

Petitioner's constricted interpretation of the VWPA would once again victimize the victim. Petitioner proposes a reading of the VWPA that would promise the possibility of restitution to victims, but renders that promise illusory through the workings of the criminal justice system. The arbitrary selection of a few compensated victims among the many who should be entitled furthers the perception of injustice. Congress intended no such deception or irrational application of the Act when it enacted the VWPA in an attempt to make the victims of crime whole.

V. ALLOWING RESTITUTION BEYOND THE COUNTS OF A PLEA BARGAIN TO ENCOMPASS ALL VICTIMS OF A CRIMINAL SCHEME WILL FACILITATE JUSTICE FOR BOTH VICTIMS AND CRIMINALS.

The ideal punishment in the criminal justice system is one where justice is done to both the criminal and the victim of crimes. For the victims, the VWPA represents a step to achieve that ideal. A broader restitution scheme

will better serve justice by compensating victims and minimizing the need for follow-on civil litigation, thereby reducing the burden on the civil process and facilitating compensation for the victims.[24]

Moreover, as a practical matter, an effective restitution scheme may be the only realistic means of compensating victims. Because most losses suffered by individual victims involve relatively small sums, restitution may be the only practical way of compensating for their economic injuries.[25] A broader reading of the VWPA will do nothing more than allow the victim of crime the possibility of receiving compensation for the loss incurred without the necessity of pursuing a separate civil lawsuit against the criminal defendant.[26] This reading of

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[24] The award of restitution under the VWPA is ultimately within the discretion of the trial court and in the event that a victim is not fully compensated, that victim may resort to civil litigation. In such a situation, the VWPA explicitly provides that criminal defendants are collaterally estopped from relitigating the elements of the crime. 18 U.S.C. § 3580(e). Any interpretation of the VWPA that needlessly limits the reach of this collateral estoppel rule will unnecessarily expand the demands on the civil judicial system by requiring relitigation of issues that as a practical matter have already been determined.

[25] The Senate Report notes "that the average dollar losses victims suffer totals hundreds of dollars, not thousands or tens of thousands." Senate Report at 2536. Separate civil actions to recover these sums simply are not practical.

[26] The VWPA mandates that "[a]ny dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence." 18 U.S.C. § 3580(d). This evidentiary standard is, of course, the same standard that would be used by a civil claimant to recover monies from the perpetrator of crime. The burden of proof at sentencing proceedings is not a constitutional issue. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) ("[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all"); *see also Specht v. Patterson*, 386 U.S. 605, 610 (1967) (setting forth

the VWPA supports all the legislation's purposes and does not adversely affect the defendant's rights.

For the offender, justice involves penalties sufficient to punish for the crime and deter its repetition. The system proposed by petitioner wil not serve those penal goals.

Most prominently, corporate defendants that commit economic crimes face no drastic sanctions. A fine may not provide justice and often is too small in amount to make crime unprofitable. Meaningful punishment, as well as fundamental fairness, require that a corporation be required to disgorge all the proceeds of its crime, in addition to the punitive sanction imposed by the state for the commission of the offense.

Petitioner's proposal would shelter those defendants, individuals as well as corporations, for whom incarceration is not a realistic punishment. In addition, such a system provides criminal defendants with the ability to manipulate the criminal justice system for their financial benefit, allowing them to weigh the value of the penalty against their potential economic recovery from the offense. A broader reach to the restitution system will alter this calculation in society's favor. "Perpetrators of crime should bear the full consequences of their criminal acts to the extent that this is possible. Neither innocent victims nor society should bear any of the resultant costs." *United States v. Mounts*, 793 F.2d 125, 128 (6th Cir.), *cert. denied*, 479 U.S. 1019 (1986).

However, the restricted statutory interpretation proposed by the petitioner only ensures that even those white collar criminals that are caught will never fully

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procedural safeguards for sentencing); *United States v. Gooden*, 892 F.2d 725, 728 (8th Cir. 1989) (raising sentence level based on uncharged drug transaction proved by preponderance of the evidence does not violate due process).

disgorge the benefits of their crimes.[27] His system allows criminals to retain some and, in petitioner's case, a large majority, of the proceeds of his crime. Such a scheme does not provide effective deterrence and is not the outcome that Congress intended.[28]

VI. THE ABILITY OF COURTS TO AWARD RESTITUTION BEYOND THE COUNTS OF A PLEA BARGAIN MUST BE BASED ON REASONABLE GUIDELINES AND NOTICE TO THE CRIMINAL DEFENDANT.

The Fifth Circuit, and all other courts that have addressed this issue, have recognized that any restitutionary scheme must contain appropriate safeguards. Meaningful procedures for determining the amount and nature of restitution must be implemented to ensure that the purposes of the VWPA are met. *Amici curiae* firmly believe that implementation of appropriate standards is necessary to protect both the victims of crime and the rights of criminal defendants.

The VWPA itself provides specific guidelines for implementation of a restitution order. The VWPA provides that the sentencing judge "*shall* consider the amount of the loss sustained by any victim as a result of the of-

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[27] White collar and economic crimes are often complex and difficult to investigate and stop. Many of these frauds go unpunished and undetected. Therefore, even a full restitution scheme will never remotely restore the full costs of economic crime.

[28] Restitution is "a particularly effective deterrent" for property and white collar crimes, because the criminal's gain is usually equal to the victim's loss. Note, *Victim Restitution in the Criminal Process: A Procedural Analysis*, 97 Harv. L. Rev. 931, 939 (1984). In fact, "[t]he deterrent value of restitution would be greater if the amount of restitution exceeded the offender's gain. Given that not all offenders are convicted, an offender on average will actually profit if his punishment is limited to his gain." *Id.* at 939 n.61. Moreover, the theory of restitution is less well suited for crimes against the person, where the victim's loss is not easily quantifiable.

fense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate." 18 U.S.C. § 3580(a) (emphasis added). The statute also provides specific burdens of proof for the restitution award.[29] The financial condition of the victim is not relevant to the restitution award because "[s]uch a Robin Hood philosophy is hardly relevant to a system of justice based on equality under the law." *United States v. Clausen*, 792 F.2d 102, 107 (8th Cir.), *cert. denied*, 479 U.S. 858 (1986); *see also United States v. Kallash*, 785 F.2d 26, 31 (2d Cir. 1986).

Beyond these statutory requirements, courts have developed specific procedures under the particular facts of those cases for effectively implementing the congressional goal of awarding restitution to victims of crime. This Court need not set forth detailed guidelines for the restitution scheme allowed by the VWPA. Such a system should await determination through case law developments in the lower courts.

However, some fundamental principles can be ascertained. Notice to the criminal defendant of crimes for which restitution may be required is the critical requirement. Proper notice largely eliminates any constitutional or statutory infirmities.[30] In most instances the

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[29] The government bears the burden of proving the "amount of the loss sustained by a victim as a result of the offense." 18 U.S.C. § 3580(d). The defendant bears the burden of proving his financial resources and financial needs. *Id.* Any dispute as to the proper amount or type of restitution "shall be resolved by the court by the preponderance of the evidence." *Id.*

[30] At a minimum, the defendant "must be forewarned that restitution may be ordered in the higher amount, and he must be given an opportunity to contest any allegation as to the amount of loss he is supposed to have caused." *United States v. Berrios*, 869 F.2d 25, 32 (2d Cir. 1989).

boundaries of the criminal scheme for which restitution is sought are clear; the requirement of notice effectively supplements this clarity and assists in situations where the explicit boundaries of the scheme are difficult to ascertain.

In addition to the notice requirement, the information used in making a restitution award must bear minimal indicia of reliability and the defendant must be given an opportunity to refute this information.[31] This requirement should apply to both hearsay testimony and information relating to criminal activity beyond the counts of conviction.[32] A system based on appropriate notice and an opportunity to contest facts will do nothing more than allow victims of crime to receive compensation in a criminal proceeding, as Congress intended.

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[31] *United States v. Giltner*, 889 F.2d 1004, 1007 (11th Cir. 1989); *see also United States v. Hairston*, 888 F.2d 1349, 1353 (11th Cir. 1989); *United States v. Agyemang*, 876 F.2d 1264, 1272 (7th Cir. 1989).

[32] *United States v. Cohoon*, 886 F.2d 1036 (8th Cir. 1989); *United States v. York*, 830 F.2d 885, 893 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988).

CONCLUSION

A narrow interpretation of VWPA is neither required by the language of the statute nor compatible with Congress' unequivocal intention in passing the legislation. This Court should hold that the VWPA permits restitution to victims of the offense as determined by the indictment, the plea agreement and the evidence of guilt. Under either a broad or narrow interpretation of the VWPA, however, when the indictment formally alleges a scheme, conspiracy or enterprise, all victims of the integrated criminal activity should be able to receive restitution.

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